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No. 84-1728

# In the Supreme Court of the United States

OCTOBER TERM, 1985

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

*v.*

FEDERAL LABOR RELATIONS AUTHORITY AND
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, NATIONAL COUNCIL OF EEOC LOCALS

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE PETITIONER

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## QUESTION PRESENTED

Whether a federal agency's compliance with Office of Management and Budget Circular A-76, an Executive Branch management policy directive establishing guidelines for contracting out functions to private enterprise, is a mandatory subject of negotiation under Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.*

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## BRIEF FOR THE PETITIONER

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 744 F.2d 842. The decision and order of the Federal Labor Relations Authority (Pet. App. 40a-48a) is reported at 10 F.L.R.A. 3.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 49a-50a) was entered on September 21, 1984, and a timely petition for rehearing was denied on December 3, 1984 (Pet. App. 38a-39a). On February 26, 1985, the Chief Justice extended the time within which to file a petition for a writ of certiorari to

and including May 2, 1985. The petition was filed on that date and was granted on June 24, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTES INVOLVED

The relevant portions of Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.*, are reproduced in the appendix to this brief.

## STATEMENT

1. a. In October 1978 Congress enacted the Civil Service Reform Act of 1978 (the Act), Pub. L. No. 95-454, 92 Stat. 1111 *et seq.* Title VII of the Act, 5 U.S.C. 7101 *et seq.*, governs labor-management relations, including collective bargaining, for nearly all federal agencies. Title VII replaced the federal labor relations program that was created in 1962 by Executive Order No. 10988, 3 C.F.R. 521 (1959-1963 comp.), and that was revised and continued by Executive Order No. 11491, 3 C.F.R. 861 (1966-1970 comp.). See 5 U.S.C. 7101 note.

Under the Act, a federal agency is required to bargain in good faith with a federal employee union about conditions of employment. 5 U.S.C. 7103(a)(12), 7114(b)(2). See generally *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 464 U.S. 89, 91-92 (1983). "[C]onditions of employment" are defined, with several exceptions not relevant here (see 5 U.S.C. 7103(a)(14)(A)-(C)), as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions." 5 U.S.C. 7103(a)(14). The Act also provides that if an impasse in bargaining is reached, either party to the negotiations may ask the Federal Service Impasses Panel (the Panel) to intervene.

5 U.S.C. 7119(c). The Panel has the authority to judge a proposal on its merits and to order its adoption by the parties. 5 U.S.C. 7119(c)(5)(B) and (C); see 5 C.F.R. 2471.11(a). Thus, a determination that a bargaining proposal is negotiable carries with it the possibility that the proposal ultimately will be incorporated as part of the collective bargaining agreement pursuant to an order of the Panel. See *Council of Prison Locals* v. *Brewer*, 735 F.2d 1497, 1499 (D.C. Cir. 1984); *Indiana Air National Guard* v. *FLRA*, 712 F.2d 1187, 1189 n.1 (7th Cir. 1983).

The Act also creates a mechanism for the resolution of "grievances," a term that is defined to include complaints alleging violations of a collective bargaining agreement or otherwise relating to employment, 5 U.S.C. 7103(a)(9)(A), (B) and (C)(i), as well as "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." 5 U.S.C. 7103(a)(9)(C)(ii). Under 5 U.S.C. 7121(a), all collective bargaining agreements must contain procedures for resolving grievances. The statute generally provides that grievances may be resolved through those negotiated grievance procedures, except for matters that specifically are made nongrievable by the contract. 5 U.S.C. 7121(a)(2). Grievances that cannot be resolved satisfactorily by the parties through the negotiated procedure are subject to binding arbitration. 5 U.S.C. 7121(b)(3)(C).[1]

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[1] The Act makes the negotiated grievance procedure the exclusive mechanism for resolving most of the grievances that fall within its coverage. 5 U.S.C. 7121(a)(1). Grievances that involve discrimination (see 5 U.S.C. 2302(b)(1)) or adverse action (see 5 U.S.C. 4303, 7512), however, may be resolved either through the negotiated procedure or through

While the Act thus makes many matters negotiable and arbitrable, it also reserves the exercise of certain rights to agency management. In 5 U.S.C. 7106(a), the Act provides that "nothing in [Title VII] shall affect the authority of any management official of any agency" to exercise a number of enumerated management prerogatives, including the right "in accordance with applicable laws * * * to make determinations with respect to contracting out." 5 U.S.C. 7106 (a)(2)(B). An agency's duty to bargain with respect to these reserved rights is limited to the "procedures which management * * * will observe in exercising" the rights and "appropriate arrangements for employees adversely affected" by exercise of the rights. 5 U.S.C. 7106(b)(2) and (3). The Act also precludes an agency from bargaining over proposals that are "inconsistent with any Federal law or any Government-wide rule or regulation," and over any "matters which are the subject of * * * a Government-wide rule or regulation." 5 U.S.C. 7117(a)(1).

Finally, the Act establishes the Federal Labor Relations Authority (FLRA or Authority) as an independent body within the Executive Branch with responsibility for supervising the federal collective bargaining process and the grievance and arbitration machinery established by Title VII. Among other responsibilities, the Authority adjudicates negotiability disputes and unfair labor practice complaints, and reviews arbitral awards. 5 U.S.C. 7105(a)(2) (A)-(I). The Authority may seek enforcement of

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a separate, statutory appeals mechanism. 5 U.S.C. 7121(d) and (e). See *Cornelius* v. *Nutt*, No. 83-1673 (June 24, 1985), slip op. 2-3. The Act also entirely excludes certain other matters from the negotiated procedure. 5 U.S.C. 7121(c).

its orders in appropriate United States courts of appeals. 5 U.S.C. 7123(b). Persons, including federal agencies, who are aggrieved by FLRA orders may seek judicial review in the courts of appeals, 5 U.S.C. 7123(a), although certain Authority orders concerning exceptions to arbitral awards are not directly reviewable in court. 5 U.S.C. 7123(a)(1).

b. Office of Management and Budget (OMB) Circular A-76 is a management policy directive applicable to Executive Branch agencies. Issued pursuant to delegated presidential management authority,[2] the Circular establishes "the policies and procedures used to determine whether needed commercial or industrial type work should be done by contract with private sources or in-house using Government facilities and personnel." 44 Fed. Reg. 20557 (1979).[3]

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[2] In addition to its budgetary and legislative functions, OMB serves as "the President's principal arm for the exercise of his managerial functions." 31 U.S.C. 501 note.

[3] The longstanding policy of the federal government to foster economy by acquiring needed goods and services from the private sector whenever it would be feasible and efficient to do so was first recognized officially in Bureau of the Budget Bulletins, issued in 1955, 1957 and 1966. In 1967, this policy was expressed and implemented in a directive known as Circular A-76. See 44 Fed. Reg. 20558 (1979). The Circular was revised substantially in 1979. *Id.* at 20556. It has been amended in several respects since then. See 45 Fed. Reg. 69322 (1980); 47 Fed. Reg. 6511 (1982); *id.* at 46783; 48 Fed. Reg. 37114 (1983); 50 Fed. Reg. 32812 (1985). The 1979 version of the Circular was in effect at the time of the contract negotiations in this case. In recent years Circular A-76 and amendments thereto have been published in the notice section of the Federal Register. The supplement to the current version of the Circular was not published because

It thus prescribes the steps that agencies should follow in making the cost analyses that shape the decision whether to contract out to private industry for goods and services the government needs, or to retain performance of a function in-house.

The Circular also provides that it "does not establish, and shall not be construed to create, any substantive or procedural basis for any person to challenge any agency action or inaction on the basis that such action was not in accordance with this Circular," except as provided in the Circular itself. 44 Fed. Reg. 20558 (1979). See also 48 Fed. Reg. 37114 (1983). The Circular directs each agency to establish an appeals procedure that protects "the rights of all affected parties—Federal employees and their representative organizations, contractors and potential contractors, and contract employees and their representatives." 44 Fed. Reg. 20561 (1979). Under such procedures, a party interested in an initial agency contracting-out determination may file an objection; an impartial agency official, at a level organizationally the same or higher than the official who approved the original decision, must rule on any objection within 30 days. The Circular provides that the decision on appeal is "final" and that the appeals "procedure and agency determinations may not be subject to negotiation, arbitration, or agreements." *Ibid.*[4]

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of its length, however; copies of the supplement have been lodged with the Clerk of the Court and provided to counsel for respondents.

[4] At the time the appeals procedure first was included in Circular A-76, OMB explained that it was designed to "promote more effective and consistent implementation" of the Circular and to "provide a level of visibility and discipline

2. a. In 1980, during the course of contract negotiations with the Equal Employment Opportunity Commission (EEOC), respondent American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals (the Union) proposed the following contract provision:

> The EMPLOYER agrees to comply with OMB Circular A-76, and other applicable laws and regulations concerning contracting-out.

Pet. App. 40a. The EEOC took the position that the duty to bargain in good faith did not extend to the Union's proposal and that bargaining on such matters "would be inconsistent with law, rule and regulations" (C.A. App. 9). It also stated that because "the Circular is a policy statement, * * * the authority vested with the agency head cannot be shared with an exclusive labor-organization or subjected to any third party determinations" (*id.* at 13). The Union subsequently submitted the proposal to the FLRA for a negotiability determination (*id.* at 1-2).

The FLRA ruled that the Union's proposal was negotiable (Pet. App. 40a-43a). The Authority recognized that the proposal addressed a subject listed in the management rights provision of the Act, 5

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that should significantly enhance implementation." 44 Fed. Reg. 20557 (1979). The appeals procedure provisions now are found in the supplement to Circular A-76 (at I-14 to I-15). Under the current procedure, a party affected by an agency decision to contract out may request detailed documentation supporting the agency's cost comparison analysis; appeals must be filed within 15 days of receipt of the documentation. As in the 1979 version of the Circular, a decision must be rendered within 30 calendar days of receipt of the appeal.

U.S.C. 7106(a) (Pet. App. 40a-41a). The Authority nevertheless concluded that bargaining about—and adoption of—the proposal would not contravene that provision, because the Union's position "would contractually recognize external limitations on management's right but would not establish, either expressly or by incorporation, any particular substantive limitations on management" (*id.* at 41a).

The Authority also acknowledged that bargaining about the Union proposal ultimately could result in subjecting disputes about compliance with Circular A-76 to the grievance and arbitration process, in apparent conflict with the exclusive appeals procedure provided in the Circular (Pet. App. 42a). It concluded, however, that even assuming the existence of a conflict between the proposal and the Circular—and assuming as well that the Circular fit within Section 7117(a)(1)'s definition of a "Government-wide rule or regulation"—the Circular could not "limit the *statutorily* prescribed scope and coverage of the parties' negotiated grievance procedure" (*ibid.*; emphasis in original).[5]

b. A divided panel of the court of appeals enforced the order of the Authority (Pet. App. 1a-37a).

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[5] The Authority also found "essentially procedural" and hence negotiable under 5 U.S.C. 7106(b)(2) a proposal that the EEOC notify the Union of its intention to solicit bids for contract work that could result in reductions-in-force or transfers affecting employees. Pet. App. 43a-44a. But the Authority found nonnegotiable a proposal that would have required the EEOC to minimize the effect of contracting-out decisions on employees, explaining that the proposal would interfere with management's statutorily reserved right to lay off employees. Pet. App. 45a-47a. Neither of these determinations is at issue at this stage of the proceedings.

The court concluded that the Union proposal would not unduly restrict management's reserved right to make contracting-out determinations, for two reasons. First, the court reasoned that the phrase "in accordance with applicable laws," which appears in the management rights clause, 5 U.S.C. 7106(a)(2), operates to restrict the authority reserved to management. Because the EEOC must comply with such laws, the court opined—and because, in the court's view, Circular A-76 is a "law" within the meaning of Section 7106(a)(2)—"[a]ny restriction imposed by the proposal on management's contracting-out authority * * * stems from the Act's mandate" (Pet. App. 9a). Thus, while agencies generally need not bargain with respect to their right to make contracting-out determinations, the court concluded that they are required to bargain about the duty to comply with all "applicable laws" affecting that right. *Id.* at 8a-11a.

Second, the court of appeals concluded that the Union proposal would not divest management of any existing control over the contracting-out process. The court believed that a union claim that management had failed to comply with Circular A-76's contracting-out guidelines would fall within the statutory definition of a grievance, 5 U.S.C. 7103(a)(9), and that arbitrators therefore would have jurisdiction to decide such claims even if there were no collective bargaining agreement provision requiring compliance. Pet. App. 11a-16a. In essence, the court reasoned that the Union *already* has the right to take to arbitration claims of noncompliance with the Circular. *Id.* at 12a, 15a-16a.

The court of appeals also rejected the EEOC's argument that the Union proposal is not a proper sub-

ject of bargaining because it is inconsistent with the exclusive appeals procedure established by Circular A-76. In the court's view, Title VII does not permit the text of the Circular to restrict the scope of a grievance mechanism created under the Act. Pet. App. 16a-17a.

Judge MacKinnon dissented (Pet. App. 18a-37a). He concluded that the Union proposal conflicted with the plain language of the management rights provision because it required bargaining about the substantive policy-making criteria to be used by the agency in making contracting-out determinations (*id.* at 22a-26a): "[i]f (1) the Circular provides substantive criteria for contracting out, and (2) bargaining over substantive criteria for contracting out is prohibited by law, then (3) a collective bargaining proposal which purports to *require* an agency to meet substantive criteria is *not* negotiable" (*id.* at 24a, emphasis in original). Judge MacKinnon also rejected what he viewed as the court's suggestion that the Act's grievance provisions override its management rights clause (*id.* at 27a-29a). And he maintained that, in any event, alleged violations of Circular A-76 would not be statutorily grievable in the absence of a contractual provision requiring compliance with the Circular, because in his view the Circular does not "affect[] conditions of employment" within the meaning of 5 U.S.C. 7103(a)(9) (Pet. App. 29a-36a).

The court of appeals denied the EEOC's petition for rehearing with suggestion for rehearing en banc. with Judges Bork, Scalia, and Starr dissenting from denial of the suggestion for rehearing en banc (Pet. App. 38a-39a).

## SUMMARY OF ARGUMENT

A. 1. Title VII's management rights clause, 5 U.S.C. 7106, provides that "nothing" in Title VII "shall affect the authority of any management official in any agency * * * in accordance with applicable laws * * * to make determinations with respect to contracting out." On its face, this provision renders nonnegotiable any bargaining proposal that, if adopted, would affect agency contracting out decisions. The Union's proposal in this case—which is intended to subject to arbitral review all such decisions—cannot be squared with the statutory language. The delay and increased expense that would follow from reviewability would, in the language of the statute, "affect" management authority. And this problem is compounded by the likelihood that arbitral second-guessing of agency decisions would be shaped by the norms of industrial relations rather than by simple fidelity to the requirements of the Circular. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 54, 56-57 (1974).

2. The court of appeals sought to avoid this conclusion by noting that, under Section 7106(a)(2), certain reserved management rights (including the right to contract out) must be exercised in "accordance with applicable laws." Circular A-76, the court continued, is such a law. Because agency managers must comply with applicable laws regardless of whether they are embodied in a contract, the court held that incorporating Circular A-76 into the contract would not affect management authority, and thus would not run afoul of Section 7106. The court's reasoning, however, is fundamentally flawed, for several reasons.

First, Circular A-76 is not an "applicable law" within the meaning of Section 7106(a)(2); indeed, it is not a "law" at all that is enforceable in any forum. Instead, the Circular is a presidential management directive that is no different in principle from policy advice on the management of the Executive Branch given directly from the President to one of his officers. Whether an agency manager is "complying" adequately with a policy directive of this sort can be determined only by the President or his designee. The Circular thus is interpreted and enforced internally, ultimately through the President's authority over his subordinates, see, *e.g.*, *Myers* v. *United States*, 272 U.S. 52, 163-164 (1926); as the Circular itself explicitly provides, it does not create rights that can be asserted by third parties. A contrary conclusion would make judges or arbitrators—rather than the President himself—the final arbiters of whether agencies are in compliance with the President's policy directives. Absent some powerful indication to the contrary in the statute or its legislative history, it is implausible to suggest that Congress, through its recognition that management prerogatives must be exercised in accordance with "applicable laws," intended for the first time to give unions and union members that sort of unique role in the management of the Executive Branch.

Second, even if Circular A-76 could be characterized as a "law," it plainly is not a law that imposes external constraints on the exercise of management rights. While the Circular directs management towards a particular goal, the nature of the Circular's implementation is itself committed to the agency. Virtually every determination that precedes the ultimate contracting out decision—from the question whether the activity at issue is one that can be en-

trusted to private contractors to the calculation of the cost of performing a service in-house—involves an exercise of agency judgment. For this reason, both the courts and the Merit Systems Protection Board have held that application of the Circular is not subject to judicial review because it is committed to agency discretion by law. When Congress acknowledged in Section 7106(a)(2) that there are external restrictions on management discretion, then, it could not have had in mind directives like Circular A-76; there surely is no reason to believe that Congress intended to entrust arbitrators with the authority to make determinations that the courts have found to be beyond their own competence.

Third, the subjects addressed by Circular A-76 are not of the kind that Congress believed appropriate for arbitral consideration. Under the executive order regime that preceded the enactment of Title VII, which made use of a management rights clause that was virtually identical to Section 7106(a)(2), it was understood that management rights were not infringed when arbitrators heard challenges to agency compliance with laws governing discipline and promotions—laws that had a direct and immediate impact on individual employees and on the agency's relationship with its workforce. In contrast, contracts during that period did not incorporate by reference, and arbitrators did not interpret, laws or regulations that related more generally to the manner in which the agency wished to conduct its operations. There is no evidence that Congress intended to depart from this understanding when it enacted Title VII. Yet the court of appeals' holding, which appears to assume that Section 7106(a)(2) makes negotiable and arbitrable all laws that bear in any way on the exercise of management rights, would turn Title VII into

a catch-all that can be used to test agency compliance with virtually any legal requirement.

Finally, even if the court of appeals were correct in holding that Circular A-76 is an "applicable law" that constrains the exercise of management rights within the meaning of Section 7106(a)(2), it erred in identifying the nature of the constraint. The Circular has a procedural aspect: its exclusive, expedited grievance procedure, which provides for intra-agency review of challenges brought by all concerned parties. If the Circular constrains agency discretion, it does so only to the extent that contracting-out decisions may be challenged within the agency. By the Circular's own terms, management has "surrendered" its authority only to that extent.

B. The court of appeals supported its holding that the Union's proposal is negotiable by looking to the nature of Title VII's grievance machinery. Grievances—which are defined in the statute to include any claimed violation of a "law, rule, or regulation affecting conditions of employment"—may be resolved through a negotiated grievance mechanism unless the parties provide otherwise by contract. 5 U.S.C. 7103(a)(9)(C)(ii), 7121(a). Pointing to these provisions, the court reasoned that claimed violations of the Circular are grievances that can be grieved and submitted to arbitration whether or not the contract between the Union and EEOC requires compliance with the Circular. The court therefore concluded that adoption of the Union's proposal would in no way affect management rights. Again, however, the court's expansive analysis misread Title VII.

As a threshold matter, Circular A-76 is not a "law, rule, or regulation" within the normal meaning of those terms, so that claimed violations of the Circular are not grievances. And even if they otherwise were

grievable, Title VII's management rights provision would bar application of the statutory grievance and arbitration procedure to disputes concerning compliance with Circular A-76. The nature of agency compliance with the Circular is a management right. And Section 7106(a) unequivocally provides that "nothing in this chapter [that is, Title VII] shall affect" management's authority to exercise its reserved prerogatives. The management rights clause thus constitutes an express limitation on the scope of the grievance and arbitration procedure, which is, of course, created elsewhere in Title VII. The grievance machinery in Title VII cannot trump the management rights provision; any other conclusion would mean that management rights are reserved only if arbitrators eventually agree with the decisions taken by management.

C. Finally, the court of appeals' holding cannot be squared with 5 U.S.C. 7117(a)(1), which provides that the duty to bargain exists only "to the extent not inconsistent with any Federal law or any Government-wide rule or regulation," and does not "extend to matters which are the subject of * * * a Government-wide rule or regulation." While Circular A-76 is not a rule or regulation within the ordinary meaning of those terms, Congress specifically intended that executive policy directives be treated as rules or regulations for purposes of Section 7117(a)(1). H.R. Conf. Rep. 95-1717, 95th Cong., 2d Sess. 158-159 (1978).

Circular A-76 establishes its own exclusive, expedited appeals procedure; it also provides that contracting-out decisions are not subject to negotiation, arbitration or agreement. These provisions are critical to the contracting-out process established by the Circular. The Union's proposal, which is designed to

bring grievance and arbitration procedures to bear on complaints concerning application of the Circular, on its face is thus "inconsistent with * * * [a] Government-wide rule or regulation." Similarly, because contracting out is the "subject" of Circular A-76, it may not be discussed at the bargaining table.

## ARGUMENT

### AN AGENCY'S COMPLIANCE WITH INTERNAL EXECUTIVE BRANCH MANAGEMENT DIRECTIVES CONCERNING CONTRACTING OUT MAY NOT BE THE SUBJECT OF NEGOTIATION OR ARBITRATION UNDER THE CIVIL SERVICE REFORM ACT OF 1978

OMB Circular A-76 sets out the policies and procedures to be followed by Executive Branch managers when they consider whether to contract out to private industry for goods or services needed by the government. The Circular therefore addresses precisely the area that Congress intended to make the exclusive province of agency managers when it "include[d] a specific broad statement of management rights" in Title VII of the Civil Service Reform Act of 1978. H.R. Rep. 95-1403, 95th Cong., 2d Sess. 12 (1978). Yet the court of appeals held that agency compliance with Circular A-76 may be made the subject both of negotiation and of arbitration under the Act.

This decision in large part turns Title VII on its head. Pointing to the management rights clause, it makes reviewable—for the first time—decisions taken under the internal management directives of the Executive. And it intrudes the processes of negotiation and arbitration into areas that Congress specifically reserved to management. In doing so, the court of appeals disregarded this Court's reminder that Con-

gress, in enacting Title VII, took pains "carefully [to] preserv[e] the ability of federal managers to maintain 'an effective and efficient Government.'" *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 464 U.S. 89, 92 (1983), quoting 5 U.S.C. 7101(b).

### A. The Management Rights Clause Bars Negotiation Over Contracting Out Decisions Made Pursuant To OMB Circular A-76

1. Title VII's management rights clause, 5 U.S.C. 7106, was enacted "to preserve the essential prerogatives and flexibility Federal managers must have." H.R. Rep. 95-1403, *supra*, at 43-44. See Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, at 923-924, 949 (Comm. Print 1979) (remarks of Rep. Udall) [hereinafter cited as *Legislative History*]. In particular, Section 7106(a) provides that "nothing" in Title VII "shall affect the authority of any management official of any agency * * * in accordance with applicable laws * * * to make determinations with respect to contracting out."

On its face, this provision renders nonnegotiable any bargaining proposal that would affect substantive agency decisions relating to contracting out for goods or services.[6] It "requires the agency to retain

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[6] Congress carefully set out the exceptions to this blanket restriction in Section 7106(b), providing that negotiation is permissible "*at the election of the agency*, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work."

the right to make determinations with respect to contracting out work" (H.R. Conf. Rep. 95-1717, 95th Cong., 2d Sess. 154 (1978)), and thus necessarily means that "a labor organization cannot bargain with agencies over * * * contracting out." *Legislative History* 840 (remarks of Rep. Clay). See H.R. Rep. 95-1403, *supra*, at 378 (supplemental views of Rep. Clay and six others).[7] The court of appeals' decision,

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Section 7106(b)(1) (emphasis added). Negotiation also is permissible on the procedures management will observe in exercising reserved management authority (Section 7106(b)(2)) and on "appropriate arrangements for employees adversely affected" by the exercise of management prerogatives (Section 7106(b)(3)).

Pointing to Section 7106(b)(2), the court of appeals suggested (Pet. App. 9a-10a n.12) that the Union's proposal might be negotiable because it is more procedural than substantive. The FLRA, however, did not find the proposal to be procedural in nature in the decision and order that it rendered in this case (although in another, subsequent decision it described the proposal here as "only procedural in nature," *AFGE, Local 225 and Dep't of the Army*, 17 F.L.R.A. No. 66 (Apr. 5, 1985), slip op. 6). In any event, as we show in text, the proposal would permit arbitrators to overturn agency contracting-out decisions on substantive grounds, and thus cannot be justified by reference to Section 7106(b)(2). See *Defense Language Institute* v. *FLRA*, 767 F.2d 1398, 1400-1401 & n.3 (9th Cir. 1985) (proposal that would require correction of data not prepared in accordance with Circular A-76 is not procedural in nature, and therefore is nonnegotiable); Pet. App. 24a (MacKinnon, J., dissenting).

[7] See generally H.R. Rep. 95-1717, *supra*, at 153 ("the parties may not negotiate under any circumstances" about management rights); H.R. Rep. 95-1403, *supra*, at 43 (management rights "may not be subject to collective bargaining"); S. Rep. 95-969, 95th Cong., 2d Sess. 12-13 (1978) (management rights "are not subject to the collective bargaining process"); *Legislative History* 843, 932, 933 (remarks of

which mandates bargaining on precisely that subject (and thus, potentially, subjects agency decisions on contracting out to arbitral review[8]) cannot be squared with the statutory language. Indeed, the Ninth Circuit recently rejected the reasoning of the court below, holding that an agency's compliance with Circular A-76 cannot be the subject of negotiation. *Defense Language Institute* v. *FLRA*, 767 F.2d 1395 (9th Cir. 1985).

That the Union's proposal purports only to guarantee "compliance" with Circular A-76 does not change this conclusion, for the manner in which external directives are implemented often itself turns on an exercise of management discretion. In the language of the statute, arbitral review thus inevitably will "affect" the exercise of management authority under Circular A-76. At the outset, the very fact of reviewability will affect agency decisionmaking. Federal employee unions, of course, have an understandable economic interest in challenging decisions to contract out. And once they do so, the grievance and arbitration procedure, followed by FLRA review, will

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Rep. Clay); 935 (remarks of Rep. Derwinski); 954, 993 (remarks of Rep. Ford); 1012 (remarks of Sen. Percy). See also *Department of Defense* v. *FLRA*, 659 F.2d 1140, 1143 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982); *Department of Justice* v. *FLRA*, 727 F.2d 481, 487 (5th Cir. 1984); *Customs Service* v. *FLRA*, 739 F.2d 829, 833 (2d Cir. 1984); *National Treasury Employees Union* v. *FLRA*, 691 F.2d 553, 560-561 (D.C. Cir. 1982).

[8] As we note above (at 2-3), if the Federal Service Impasses Panel orders inclusion of the Union proposal at issue here as part of the collective bargaining agreement, the Union will be permitted to file grievances challenging management determinations to contract out by alleging violations of the provisions of Circular A-76.

likely last for years (see cases cited at note 9, *infra;* Pet. App. 35a-36a).

The delays caused by this process will add to the expense of any contracting out decision, and may well make contractors reluctant to bid on government projects. Conversely, losses will result if an agency decides to proceed with a decision to contract out while a grievance is pending and an arbitrator later disagrees with the agency's judgment concerning application of Circular A-76, in the process ordering rescission of the contract and back pay for the displaced federal employees (and most likely necessitating the payment of damages to the displaced contractor).[9] The prospect of delay and added expense—

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[9] Arbitrators in several cases have ordered rescission of contracting-out determinations that were alleged to have been made in violation of guidelines modeled on those contained in Circular A-76. See *Naval Air Station, Whiting Field, and AFGE Local Union No. 1954,* FMCS No. 83K/06143 (Apr. 29, 1983) (requiring expenditure of approximately $400,000 in back pay); *Dep't of the Army, Oakland Army Base, and AFGE, Local 1157,* FMCS No. 83K/24072 (Nov. 26, 1984) (directing termination of contract, reinstatement of terminated employees, and back pay from date of termination to date of reinstatement); *U.S. Army Communications Command, Fort McClellan, and Local No. 1941, AFGE,* FMCS No. 83K/00570 (Aug. 9, 1983) (ordering agency to cease and desist from contracting out telephone services and implementing reduction in force pending proper notification to union and to reinstate any displaced employees); *U.S. Army Communications Command Agency—Redstone Arsenal and AFGE, Local 1858,* FMCS No. 83K/05094 (May 16, 1983) (contract must be cancelled until agency complies with arbitrator's interpretation of collective bargaining agreement provisions involving provision of documents to union); *Headquarters, 97th Combat Support Group (SAC), Blytheville Air Force Base, and AFGE, Local No. 2840,* FMCS No. 82K/

which could significantly retard the contracting out process [10]—in some instances will preclude contracting out altogether. And in every case those considerations will have to be taken into account by agency managers, a development that unquestionably will distort their judgment.

More basically, the nature of the arbitral process inevitably will lead arbitrators to reject legitimate exercises of agency discretion under Circular A-76. This Court often has noted that arbitrators act to "effectuate the intent of the parties rather than the requirements of enacted legislation." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 56-57 (1974). "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it." *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-582 (1960).[11] As

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20840 (Aug. 9, 1982) (ordering cancellation of procurement action). Exceptions to these awards have been filed with the FLRA but have not yet been resolved.

[10] OMB has estimated that delays due to arbitral review of contracting-out decisions will cause the government a loss in cost savings of approximately $142 million for the period 1986-1989.

[11] Thus, arbitral "judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, [and the arbitrator's] judgment whether tensions will be heightened or diminished." *Warrior & Gulf*, 363 U.S. at 582. See generally Meltzer, *Labor Arbi-*

a result, arbitral decisions are shaped by and reflect the law of the shop, "regardless of whether [the] contractual rights [at issue] are similar to, or duplicative of, the substantive rights secured by [legislation]." *Gardner-Denver*, 415 U.S. at 54. Indeed, labor arbitrators, who generally are chosen because of their knowledge of "the demands and norms of industrial relations" (*id.* at 57), may well "not be conversant with the public law considerations" that bear on questions involving issues of public policy. *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 743 (1981). It can be expected, then, that arbitral rulings on challenges to agency compliance with Circular A-76 will be grounded on considerations other than simple fidelity to the requirements of the Circular—a factor that will lead arbitrators to intrude upon the legitimate exercise of what are, under Section 7106, reserved management prerogatives.[12]

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*tration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 U. Chi. L. Rev. 30, 32-35 (1971); Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1489, 1493-1507 (1959); Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1016-1024 (1955).

[12] It is unlikely that arbitral second-guessing of legitimate management decisions could be cured on review. While arbitral judgments are appealable to the FLRA, review by the Authority is not plenary (see 5 U.S.C. 7122); in any event, the "specialized expertise" of the FLRA—like that of arbitrators themselves—is "in its field of labor relations." *Bureau of Alcohol, Tobacco & Firearms*, 464 U.S. at 97; see *id.* at 92-93. And 5 U.S.C. 7123(a)(1) precludes direct judicial review of certain FLRA orders involving exceptions to arbitral judgments. The precise scope of permissible judicial review remains unsettled. See *Andrade* v. *Lauer*, 729 F.2d

2. The court of appeals did not take issue with these observations. It nevertheless was undisturbed by the predictable effect that the Union's proposal will have on management's right to contract out, reasoning that an agency's reserved management prerogatives are not absolute but rather are limited by Section 7106(a)(2)'s requirement that they be exercised "in accordance with applicable laws" ("nothing * * * shall affect [management] authority * * * in accordance with applicable laws * * * to make determinations with respect to contracting out"). Pet. App. 8a. Because agency managers must comply with applicable laws "regardless of whether the [Union's] proposal is adopted as part of the collective agreement" (*id.* at 9a), the court opined that permitting a *contract* also to require compliance with such laws would not infringe on management's reserved rights; it therefore held that Section 7106 does not forestall negotiations under Title VII directed at subjecting such compliance to arbitral review (*id.* at 8a-9a). The court found this reasoning dispositive here because the President, through OMB, has directed agencies to follow the policy guidance provided by Circular A-76.

The court's conclusion that the Circular is an "applicable law," however, is plainly wrong, for a number of independent reasons. Circular A-76 is not a "law" at all, and does not set down strictures of the sort that Congress would have believed to be subject to third party review in *any* forum. Moreover, the Circular does not impose any identifiable constraints on management. It does not address matters that

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1475, 1485 & n.16 (D.C. Cir. 1984); *United States Marshals Service* v. *FLRA*, 708 F.2d 1417 (9th Cir. 1983); *AFGE, Local 1923* v. *FLRA*, 675 F.2d 612 (4th Cir. 1982).

Congress intended to fall within the "applicable laws" rubric when it wrote Section 7106(a)(2). And, in any event, acting "in accordance" with the Circular requires use of the Circular's exclusive grievance procedure, rather than Title VII's arbitration mechanism.

a. Like most OMB Circulars, Circular A-76 is an executive management policy directive issued pursuant to presidential budgetary and management authority. Such directives are "intended primarily as * * * managerial tool[s] for implementing the President's personal economic policies and not as a legal framework enforceable by private civil action." *Independent Meat Packers Ass'n* v. *Butz*, 526 F.2d 228, 236 (8th Cir. 1975), cert. denied, 424 U.S. 966 (1976). As such, they are not designed to implement any specific legislative mandate; instead, Circulars such as the one at issue here are no different in principle from policy advice on the management of the Executive Branch given directly from the President to one of his officers. Circular A-76 thus is "binding" only in the sense that the President may choose to remove an Executive Branch officer who disregards its direction.

Whether an agency manager is "complying" with a presidential directive of this sort plainly cannot be determined by a third party. An officer's compliance with a presidential policy directive is adequate if the President determines that it is; the Circular thus is interpreted and enforced internally, ultimately through the President's authority over appointed officials. See, *e.g.*, *Myers* v. *United States*, 272 U.S. 52, 163-164 (1926). It follows that, "inasmuch as the Circular * * * '[is] merely [an] internal operating procedure[], rather than [a] regulation[]

officially promulgated under the APA or otherwise, [it does] not prescribe any rule of law binding on [an] agency,' *Concerned Residents of Buck Hill Falls* v. *Grant*, 537 F.2d [29], 38 [(3d Cir. 1976)], and cannot be used as the basis for an attack upon [an agency's] decision." *Local 2855, AFGE* v. *United States*, 602 F.2d 574, 582 n.28 (3d Cir. 1979). Cf. *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 538-539 (1970). Circular A-76 itself acknowledges this point, expressly providing that it was not intended to create rights that can be asserted by third parties. See 44 Fed. Reg. 20558 (1979). Indeed, a reading of the Circular that found it to create cognizable rights would make third parties such as judges or arbitrators—rather than the President—the final arbiters of whether agencies have adhered adequately to the President's policy directives.

Given these considerations, it is not surprising that the courts have pointed to the nature of Circular A-76 in holding that it and related contracting-out guidelines do not create rights that are enforceable by third parties. Because the Circular is designed to provide agency managers with policy guidance on how they are to carry out their tasks, courts have reasoned that implementation of the Circular necessarily involves "managerial choices inherently unsuitable for the judiciary to consider." *AFGE, Local 2017* v. *Brown*, 680 F.2d 722, 726-727 (11th Cir. 1982), cert. denied, 459 U.S. 1104 (1983). And because the Circular "appear[s] to be primarily a loose managerial tool for implementing the government's stated policy of relying whenever possible on private concerns to supply its needs," it cannot appropriately be seen as "creat[ing] a legally enforceable stand-

ard." *Local 2855, AFGE*, 602 F.2d at 582 n.28. See *id.* at 580-581. Cf. *AFGE* v. *Hoffman*, 427 F. Supp. 1048, 1083 (N.D. Ala. 1976); *Defense Language Institute*, 767 F.2d at 1401.

For these reasons, the court below erred in holding that use of the "applicable laws" term in Section 7106(a)(2) was intended to subject the implementation of Circular A-76 to negotiation and arbitration. In issuing that holding, the court essentially reached the ironic conclusion that Congress used the "applicable laws" language of the management rights clause to transform a tool of presidential management authority into an occasion for interference by outsiders into that management process. Absent some powerful indication to the contrary in the statute or its legislative history, however, it is implausible to suggest that Congress, through its recognition that management prerogatives must be exercised in accordance with "applicable laws," intended—for the first time—to give unions and union members a private right of action to oversee agency compliance with Circular A-76. Cf. *Cort* v. *Ash*, 422 U.S. 66, 82-84 (1975); *AFGE, AFL-CIO* v. *Carmen*, 669 F.2d 815, 822-826 (D.C. Cir. 1981).

b. The court of appeals' reliance on the "applicable laws" proviso in Section 7106(a)(2) also is flawed for another, more limited reason. Even if Circular A-76 could be characterized as a "law," an examination of the Circular indicates that it is not a law that limits the exercise of management discretion in any meaningful sense. Section 7106(a)(2) refers to regulations that impose constraints on the exercise of management authority. But while some of the calculations mandated by the Circular appear mechanical, the choices and analysis that guide the

Circular's implementation in almost every case involve a prior exercise of "judgment and managerial discretion." *Local 2855, AFGE*, 602 F.2d at 583. The Circular directs management efforts towards a particular goal; the nature of its implementation, however, is itself committed to management. When Congress acknowledged in Section 7106(a)(2) that there may be external restrictions on management discretion, then, it could not have had in mind directives like Circular A-76.

As a threshold matter, for example, the Circular provides that agencies must perform in-house all "governmental" tasks (48 Fed. Reg. 37114 (1983)) and those commercial activities that, in management's judgment, are related to the direction of "national defense" (*id.* at 37114, 37115; 44 Fed. Reg. 20558 (1979))—without defining either of those terms.[13] Similarly, in-house performance of a commercial activity is authorized if use of a private source would, again in management's judgment, "cause unacceptable delay or disruption of an essential program." 48 Fed. Reg. 37114 (1983).

The actual cost comparisons that are central to the contracting-out decision under the Circular also turn on determinations that are themselves exercises of agency judgment. Existing contracts must be subjected to a cost comparison analysis, for example, when "contract costs become unreasonable or performance becomes unsatisfactory." Supplement to

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[13] The Circular provides a non-exhaustive list of activities that generally are commercial in nature (48 Fed. Reg. 37115-37116 (1983)), but warns that "[a]gency management must used informed judgment on a case-by-case basis in making these decisions." *Id.* at 37115 n.1.

OMB Circular A-76, at I-2. The management study guide mandated by the Circular—which is used as "the basis of the Government estimate for the cost comparison with potential contractors" (*id.* at III-1) —does not "purport to replace the agencies[']' own management techniques," and in fact is intended to give agency management "freedom to be innovative and creative [in] develop[ing] a new organization." *Id.* at III-1, III-2. And as a prerequisite to its mandated cost analysis, the Circular directs management to develop a "staffing estimate" of the annual productive hours necessary to accomplish a given activity, while recognizing that there may be no way to make a precise estimate and that "informed judgment" is a "tool" to be used in the calculation. *Id.* at IV-7.

Decisions on each of these points "are matters on which experts may disagree; they involve nice issues of judgment and choice * * * which require the exercise of informed discretion." *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 317-318 (1958). As noted above, the courts accordingly have recognized that the Circular "fail[s] to provide meaningful criteria against which a court may analyze the [agency's] decision" (*Local 2855, AFGE*, 602 F.2d at 581), and therefore have held that application of the Circular is not subject to judicial review because committed to agency discretion by law. See cases cited at page 25-26, *supra*. Cf. *Heckler* v. *Chaney*, No. 83-1878 (Mar. 20, 1985), slip op. 10-11. Similarly, the Merit Systems Protection Board, the FLRA's companion agency in overseeing the federal personnel system, has held that it will not entertain a challenge to agency implementation of Circular A-76 because "[t]he evaluation of [comparative] costs is a matter committed by law to agency discretion." *Griffin* v.

*Department of Agriculture*, 2 M.S.P.B. 335, 337 (1980).

Against this background, it hardly can be doubted that "[t]he Circular's lack of definite guidelines to shape the exercise of [agency] discretion will result in arbitral review in which the arbitrator can substitute his judgment for that of the agency. * * * The operative effect of the union's proposal is to divest management of the essence of its statutory authority to contract out." *Defense Language Institute*, 767 F.2d at 1401. Cf. *United States Customs Service* v. *FLRA*, 739 F.2d 829, 831-833 (2d Cir. 1984) (even where regulations direct the development of criteria to control promotions, it is management's prerogative to choose the criteria); *AFGE, Local 1968* v. *FLRA*, 691 F.2d 565, 570-572 (D.C. Cir. 1982), cert. denied, 461 U.S. 926 (1983) (same as to performance standards); *National Treasury Employees Union* v. *FLRA*, 691 F.2d 553, 560-564 (D.C. Cir. 1982) (same). And there surely is no reason to believe that Congress intended to entrust arbitrators —whose competence, after all, "pertains primarily to the law of the shop, not the law of the land" (*Gardner-Denver*, 415 U.S. at 57)—with the authority to make determinations about the implementation of Circular A-76 that the courts have found to be beyond their own competence. In short, an external prescription that commits a matter to agency discretion cannot serve as a "law" that constrains management authority under Section 7106(a)(2).

c. In fact, when it recognized that management rights must be exercised in accordance with "applicable laws," Congress plainly had in mind a regime quite different from the one envisioned by the court of appeals. As conceived by Congress, management rights are not infringed when arbitrators apply laws

and regulations that affect employees as individuals, or that directly govern an agency's relationship with individual employees. These were the sorts of "applicable laws" that arbitrators had been empowered to interpret and apply under Executive Order 11491, which made use of a management rights provision virtually identical to Section 7106(a)(2).[14] In par-

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[14] The original management rights provision stated that "[m]anagement officials of the agency retain the right, in accordance with applicable laws and regulations," to exercise most of the management rights now enumerated in Section 7106(a)(2). Exec. Order No. 10988, § 7(2), 3 C.F.R. 525 (1959-1963 comp.), *reprinted at Legislative History* 1214. Most of the management rights now reserved in Section 7106(a)(1) were made nonnegotiable by the prior section of the Executive Order. Exec. Order No. 10988, § 6(b), 3 C.F.R. 524 (1959-1963 comp.), *reprinted at Legislative History* 1214. The "applicable laws" phrase was carried over intact into Exec. Order No. 11491, § 12(b), 3 C.F.R. 861 (1966-1970 comp.), *reprinted at Legislative History* 1251.

The management rights provisions in the executive orders were interpreted to permit negotiation about procedures concerning the exercise of management prerogatives and about the effect of the exercise of those rights on employees. See Federal Personnel Management Project, Option Paper Number Four (Sept. 20, 1977), *reprinted at Legislative History* 1393. While issues bearing on these matters were grievable, arbitrators lacked the authority to interfere with the exercise of substantive management authority. Compare, *e.g.*, *Defense General Supply Center, Richmond, Virginia and American Federation of Government Employees, Local 2047, AFL-CIO*, 5 F.L.R.C. 280 (1976) (arbitrator permitted to overturn a promotion where the agency failed to comply with the grievance procedure set forth in the parties' collective bargaining agreement) with *National Council of OEO Locals, AFGE, AFL-CIO and Office of Economic Opportunity*, 2 F.L.R.C. 293 (1974) (arbitrator lacked the authority to direct management to fill a vacancy). The negotiability of these matters has been preserved by Section 7106(b)(2) and (3).

ticular, arbitrators during the executive order regime considered challenges brought under regulations bearing on discipline and promotions—subjects that are central to any system of labor-management relations, and that are "applicable" to the workforce in a direct sense because they are designed to govern personnel matters. See, *e.g.*, *Dep't of the Army, Fort Richardson, Alaska and American Federation of Government Employees, Local 1712*, 6 F.L.R.C. 710 (1978); *National Aeronautics and Space Administration, Marshall Space Flight Center, Huntsville, Alabama and Marshall Engineers and Scientists Ass'n Local 27, Int'l Federation of Professional and Technical Engineers, AFL-CIO*, 5 F.L.R.A. 741 (1977); *Defense General Supply Center, Richmond, Virginia and American Federation of Government Employees, Local 2047, AFL-CIO*, 5 F.L.R.C. 280 (1976). See generally Federal Personnel Management Project, Option Paper Number Four (Sept. 20, 1977), *reprinted at Legislative History* 1371. Arbitrators thus were authorized to set aside individual personnel decisions because doing so did not infringe management's right to determine basic policy or to structure agency operations.

In contrast, contracts prior to enactment of Title VII could not incorporate by reference agency regulations bearing on, for example, the types of employees that would be assigned to given projects, apparently because such decisions related less to the individual employee than to the manner in which the agency wished to conduct its business. See, *e.g.*, *AFGE Local 916 and Tinker Air Force Base, Oklahoma City, Oklahoma*, 5 F.L.R.C. 604 (1977). Cf. *AFGE Local 2118 and Los Alamos Area Office,*

*ERDA*, 8 F.L.R.C. 296 (1975). While the government's underlying policies relating to assignments (or to contracting out) obviously had an indirect effect on employees, the application of such policies generally was not negotiable or arbitrable because it involved a decision *precedent* to any impact on the workforce and basic to management's role.[15]

There is no evidence that Congress in enacting Title VII intended to depart from this understanding by permitting arbitrators to construe and apply laws that bear only indirectly on the employer-employee relationship. The "applicable laws" phrase was borrowed intact from Executive Order 11491 for use in the original House version of Section 7106, which reserved to management the right "in accordance with applicable laws, to take whatever actions as may be necessary to carry out the mission of [the] agency during national emergencies." H.R. 11280, 95th Cong., 2d Sess. § 7106(a)(2) (1978), *reprinted at Legislative History* 325-326. Additional management rights were added to Section 7106(a)(2) in committee and on the floor. See H.R. Rep. 95-1403, *supra*, at 43-44; *Legislative History* 924-925 (remarks of Rep. Udall). Despite extensive discussion at each of these points—and during debate on the

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[15] In its deliberations on Section 7106 Congress implicitly recognized that there is a distinction between hiring, discipline, and promotion decisions on the one hand, and decisions relating to the other reserved management rights on the other. The first group were omitted from the House version of Section 7106(a)(2) that was reported out of committee (see H.R. 11280, *supra*, § 7106(a) *reprinted at Legislative History* 391-392); they were added to the House bill on the floor immediately prior to passage in an attempt to strengthen the management rights provision. See *Legislative History* 924 (remarks of Rep. Udall).

corresponding provision of the Senate bill as well (see, *e.g.*, S. Rep. 95-969, *supra*, at 12)—about the nature of the reserved management prerogatives, Congress nowhere suggested that it intended to give the "applicable laws" phrase a function dramatically different from the one it had served during the executive order regime. Cf. *Bureau of Alcohol, Tobacco & Firearms*, 464 U.S. at 103 (recognizing the congruence of the executive order scheme and Title VII); *Legislative History* 923 (remarks of Rep. Udall) ("unions do not get much out of [Title VII] that is not already in the Executive order").[16]

Nonetheless, the court of appeals' ruling—which seems to assume that Section 7106(a)(2) makes negotiable and arbitrable all laws (and, for that mat-

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[16] To the contrary, Congress explained only that it intended to "exten[d]" the existing grievance provisions to permit "agencies and unions to negotiate grievance and arbitration procedures to cover * * * matters which may now be appealed only under statutory procedures under the Executive order." *Legislative History* 856 (remarks of Rep. Ford). Prior to 1978 there were approximately 20 of these so-called statutory appeals procedures, which permitted employees to challenge adverse action and other disciplinary decisions, hiring and promotion, and like personnel matters. See Federal Personnel Management Project, Option Paper Number Four (Sept. 20, 1977), *reprinted at Legislative History* 1374-1376. The congressional intention to make matters of this sort grievable is manifested, for example, in Section 7121(e), which provides that adverse actions may be challenged either through the negotiated procedure or through an appeals process—a provision that reflects the fact "that Congress' primary focus in the [Act] was on adverse actions." *Lindahl* v. *Office of Personnel Management*, No. 83-5954 (Mar. 20, 1985), slip op. 23. The matters covered by a statutory appeals mechanism that Congress chose not to make grievable are enumerated in Section 7121(c). See note 21, *infra*.

ter, all Executive Branch policy directives) that bear in any way on the exercise of management rights—would have precisely that effect. Presumably, for example, it would allow an employee to complain that he would not have been reassigned had an agency employer complied with the National Environmental Policy Act, or with the Atomic Energy Act, or with an appropriations act. It would permit an arbitrator to determine agency compliance with such a statute. And it would do so in a setting in which direct judicial review often would not be available. See note 12, *supra*. "If Congress intended a result so drastic, it is not unreasonable to expect that it would have said so expressly." *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 285 n.13 (1974). Not surprisingly, Congress gave no indication whatsoever that this was its intention.

d. Finally, even if the court of appeals were correct in holding that Circular A-76 constrains the exercise of management rights under Section 7106(a)(2), it erred in identifying the nature of that constraint. The court reasoned that OMB has chosen to limit the discretion of agency managers, and that the government to that extent has surrendered its management prerogatives. The court failed to note, however, that there is a procedural aspect to Circular A-76: its exclusive, expedited grievance procedure, which provides for intra-agency review of challenges brought by all concerned parties, including contractors as well as federal workers. The Circular by its terms thus constrains management only to the extent that contracting-out decisions can be challenged within the agency. Cf. *Lehman* v. *Nakshian*, 453 U.S. 156, 160-161 (1981); *United States* v. *King*, 395 U.S. 1, 4 (1969).

Disregarding the procedural aspects of the Circular would significantly expand the limitation on management prerogatives that is worked by its substantive provisions. As we note above (at 19-20), the quick resolution of disputes that is ensured by the Circular's grievance procedures is critical to the success of the contracting-out process, because bid and other data must be current for cost comparisons to be valid. Indeed, the effect of third party review on the contracting-out process will differ markedly from its effect on agency decisions relating, for example, to compliance with laws concerning employee discipline or promotions. The prospect that a supervisor's disciplinary decision ultimately may be set aside is unlikely to affect his willingness to impose discipline in the first instance. But the delay caused by arbitral and FLRA review may itself foreclose the agency manager's option to contract out, while the prospect of added expense if his decision is overturned involves costs that go to the very nature of the contracting out decision—and that in a close case will lead a prudent manager to forgo the letting of an otherwise desirable contract. Cf. *Department of Defense* v. *FLRA*, 659 F.2d 1140, 1153 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982).

### B. The Grievance Machinery Established By Title VII Of The Act May Not Be Used To Challenge The Exercise Of Management's Reserved Right To Contract Out

As the discussion above demonstrates, incorporation of the Union's proposal into the contract would have a sharp impact on the exercise of management rights. In disregarding this effect, the court of appeals relied in large part on its belief that claimed

violations of the Circular *already* are grievable and arbitrable under Title VII's grievance machinery.[17] This belief cemented the court's conclusion that negotiations about compliance with the Circular would not "affect" management prerogatives within the meaning of Section 7106(a). See Pet. App. 11a-16a.

Under 5 U.S.C. 7121(a), "grievances" may be resolved through the negotiated grievance mechanism—and ultimately through binding arbitration (see Section 7121(b)(3)(C))—unless the parties provide otherwise by contract. "Grievance" is defined elsewhere in Title VII, in relevant part (see note 19, *infra*), as "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." 5 U.S.C. 7103(a)(9)(C)(ii). Claimed violations of Circular A-76 therefore are "grievances" that can be grieved and submitted to arbitration pursuant to these provisions, the court opined, whether or not the contract between the Union and EEOC specifically requires compliance with the Circular. Building on this conclusion, the court reasoned that "adoption of the [Union's] proposal in no way expands an employee's right to challenge management's contracting-out decisions under the grievance procedure" (Pet. App. 15a-16a, footnote omitted), and thus would not affect the exercise of

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[17] This reasoning evidently took the Union by surprise; as the Ninth Circuit recently noted, it is "incredible that the parties would so strenuously dispute a proposal that gives the union nothing it did not already possess and deprives management of nothing it had not already lost." *Defense Language Institute*, 767 F.2d at 1402. See also Pet. App. 37a n.19 (MacKinnon, J., dissenting) ("If, as the majority claims, it is entirely obvious from the statute that violations of the Circular are already grievable as a matter of law, why would the union waste its time, effort, and money in pursuing first the contract proposal and now this action?").

management rights. This expansive analysis, however—which stands as a central prop for the court's conclusion that the Union's proposal is an innocuous one—misreads Section 7106 and misstates the nature of Title VII's grievance mechanism.

1. As a threshold matter, the court of appeals erred in assuming that a claimed violation of the Circular is a grievance as defined by Section 7103(a)(9)(C)(ii). That provision addresses noncompliance with "any law, rule, or regulation." As noted above (at 24-26), however, Circular A-76 is an internal policy directive; it is not a law, rule, or regulation within the normal meaning of those terms. And Congress, in any event, undoubtedly intended Section 7103(a)(9)(C)(ii), like the "applicable laws" phrase in Section 7106(a)(2), to refer to strictures relating directly to personnel matters and to labor-management relations.[18] See pages 29-34, *supra*. Attributing a broader meaning to the terms "law, rule, or regulation" would have an extraordinary effect: it would, for the first time, subject decisions involving management policy directives to third party review, while *automatically* providing for arbitration (potentially without judicial review) of disputes involving every federal statute and regulation that arguably affects a unionized federal employee. Congress gave no indication that it intended to achieve such a result—and in that way to provide unions, but not non-unionized employees, with a unique role in managing the Executive Branch and with a private cause of action to

[18] That this was Congress's focus when it created the grievance mechanism is confirmed by the nature of the matters that Congress explicitly excepted from grievability in Section 7121(c): all involve issues bearing directly on personnel management. See note 21, *infra*.

challenge virtually every imaginable government decision. Cf. *Cornelius* v. *Nutt*, No. 83-1673 (June 24, 1985), slip op. 13.[19]

2. In any event, even were disputes concerning compliance with Circular A-76 otherwise grievable, Title VII's management rights provision would bar application of the statutory grievance and arbitration procedure to such disputes. As explained above, the nature of an agency's compliance with the Circular's mandate is a reserved management right. And Section 7106(a) unequivocally provides that "nothing in this chapter [that is, Title VII] shall affect" management's authority to exercise its reserved prerogatives. Section 7106(a) thus constitutes an express limitation on the scope of the grievance and arbitration procedure, which is, of course, created elsewhere in Title VII. See *Defense Language Institute*, 767 F.2d at 1420. As Judge MacKinnon noted in dissent, "[i]t is absurd to construe the act to say that '*nothing*' in the rest of [Title VII] affects management's right, but that the rest of [Title VII] *does* affect that right." (Pet. App. 28a; emphasis in original). Indeed, the Authority itself only recently has recognized that a union proposal that "would extend the coverage of the negotiated grievance procedure to the decision to contract out itself * * * [is] incon-

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[19] The court of appeals also suggested that a claimed violation of the Circular might be a grievance under 5 U.S.C. 7103(a)(9)(A) and (B) as a "matter relating to the employment of [an] employee." Pet. App. 12a, 13a-14a n.18. But a claim of error in, for example, the construction of an economic estimate under the Circular plainly presents too remote an issue to be considered a matter relating to the employment of an employee; if it were not, Section 7103(a)(9)(A) and (B) would render Section 7103(a)(9)(C) entirely superfluous.

sistent with [5 U.S.C.] 7106(a)(2)(B)." *AFGE, Local 225 and Dep't of the Army*, 17 F.L.R.A. No. 66 (Apr. 5, 1985), slip op. 6.[20] Thus, the grievance machinery in Title VII cannot trump the management rights provision; any other conclusion would mean that management rights are reserved only if arbitrators eventually agree with the decisions taken by management.

That Congress did not mean to create such a circular system is confirmed by Title VII's legislative history. Under the pre-Act federal labor relations program, employees could not grieve "matters otherwise excluded from the negotiations by [the management rights clause of Executive Order 11491]." Labor-Management Relations in the Federal Service: Report and Recommendations of the Federal Labor Relations Council on the Amendment of Executive Order 11491 (1975), *reprinted at Legislative History* 1317. There is no indication that Congress meant to change that practice when it enacted Title VII. To the contrary, the Senate bill expressly provided in its proposed grievance provision that negotiated grievance procedures could "cover any matter within the authority of an agency *if not inconsistent with the provisions of this chapter*"—which included the management rights provision. S. 2640, 95th Cong., 2d

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[20] See also *AFGE, Local 1968 and Department of Transportation*, 5 F.L.R.A. 70, 79 (1981) ("[t]he plain language of section 7106 provides that 'nothing' in the Statute, *i.e.*, 5 U.S.C. 7101 *et seq.*, shall 'affect the authority' of an agency to exercise the rights enumerated therein. Therefore, no grievance procedure could be negotiated pursuant to section 7121 of the Statute which would deny the authority of an agency to exercise its statutory rights under section 7106"), enforced *sub nom. AFGE, Local 1968* v. *FLRA*, 691 F.2d 565 (D.C. Cir. 1982), cert. denied, 461 U.S. 926 (1983)).

Sess. § 7221(d) (1978), *reprinted at Legislative History* 533 (emphasis added). See S. Rep. 95-969, *supra*, 109-110 (1978). In fact, because the Senate bill left the scope of the grievance mechanism to be determined by "negotiation between the parties" (*id.* at 109)—and because management rights were not subject to negotiation—the Senate plainly did not envision that management rights would be grievable.

The House bill took a different approach: it would have required the negotiated grievance procedure to provide for the resolution of all grievances. See H.R. Rep. 95-1403, *supra*, at 55-56. This bill as well, however, was described as a "small, incremental step forward" from the executive order regime (*Legislative History* 855 (remarks of Rep. Ford)). And its proposed grievance mechanism did "not represent a change, but rather an extension of the well-tested provisions of the Executive order [to reach some matters that had been resolved under statutory appeal procedures]." *Id.* at 856 (remarks of Rep. Ford). See note 19, *supra*. As enacted, the grievance provisions reflect a compromise between the Senate and House approaches, providing that matters otherwise subject to the grievance mechanism are to be grievable unless the parties agree to the contrary. See H.R. Conf. Rep. 95-1717, *supra*, at 157. But the Conference Committee nowhere suggested in its brief discussion of the issue that all matters bearing on the exercise of management rights were, for the first time, being made grievable by operation of law.

The reading of the grievance provisions offered by respondents, however, would have precisely that effect. They submit that the only matters excepted from the statutory grievance procedure are the five relatively narrow subjects enumerated in 5 U.S.C.

7121(c), evidently in the belief that the management rights provision limits negotiability but not grievability.[21] Union Br. in Opp. 16; FLRA Br. in Opp. 15-16; see also Pet. App. 12a-13a. This approach, of course, entirely ignores the language of Section 7106(a), for "Congress did *not* say that management's reserved rights are *nonnegotiable*; it said, '*nothing in this chapter shall affect*' the right of the agency to make contracting-out decisions." *Defense Language Institute*, slip op. 11 n.7 (emphasis in original).[22] See also Pet. App. 28a-29a (MacKinnon,

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[21] These include claims relating to prohibited political activities (Section 7121(c)(1)); retirement and insurance issues (Section 7121(c)(2)); removals involving national security issues (Section 7121(c)(3)); examinations, certifications and appointments (Section 7121(c)(4)); and position classifications that do not result in the reduction in grade or pay of employees (Section 7121(c)(5)).

[22] This choice of language plainly was intentional. Section 7106 (which is titled "[m]anagement rights") thus contrasts with Executive Order 11491, which placed its management rights provisions in sections titled "[n]egotiation of agreements" and "[b]asic provisions of agreements." Exec. Order No. 11491, §§ 11, 12, 3 C.F.R. 861 (1966-1970 comp.), *reprinted at Legislative History* 1250-1251. Because the scope of the grievance provision was negotiated by the parties under the executive order regime (see Labor-Managment Relations in the Federal Service: Report and Recommendations of the Federal Labor Relations Council on the Amendment of Executive Order 11491 (1975), *reprinted at Legislative History* 1315-1316), limiting negotiability served to limit grievability; when Congress chose in Title VII to set the basic scope of grievability by statute, it was forced to modify the management rights provision to provide generally that management rights would not be "affect[ed]" by anything in Title VII.

The court of appeals opined that the language of Section 7106(a) did not create an obstacle to the grievability of claimed violations of Circular A-76 because "[a] grievance

J., dissenting). And respondents' analysis would make grievable by force of law not only matters relating to the exercise of the management rights listed in Section 7106(a)(2), but also complaints involving the exercise of the prerogatives preserved by Section 7106(a)(1)—which include the right to set the mission, budget, organization and internal security practices of an agency. It is difficult to believe that Congress intended such a result to follow from enactment of a statute "one of the major purposes [of which] was to 'preserv[e] the ability of federal managers to maintain "an effective and efficient Government."'" *Nutt*, slip op. 14, quoting *Bureau of Alcohol, Tobacco & Firearms*, 464 U.S. at 92, in turn quoting 5 U.S.C. 7101(b).

### C. Bargaining Over The Union's Proposal Is Prohibited By 5 U.S.C. 7117(a)(1)

The preceding sections of this brief explain why the Union's proposal impermissibly infringes manage-

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alleging noncompliance with the Circular * * * does not affect management's substantive authority * * *. Rather, it provides a procedure for enforcing the Act's requirement that contracting-out decisions be made in accordance with applicable laws." Pet. App. 14a (footnote omitted). This observation, however, amounts only to a restatement of the court's holding (addressed at pages 23-35, *supra*) that the nature of an agency's compliance with Circular A-76 is not a reserved management right. It should be added that, if this was the court's view, its analysis was circular. In reaching its holding that the Union's proposal was negotiable because it did not infringe on a management right, the court relied in part on its view that alleged noncompliance with Circular A-76 was grievable in any event; in explaining its conclusion that alleged noncompliance with the Circular was grievable, the court relied on its prior conclusion that the nature of an agency's compliance with Circular A-76 is not a reserved management right.

ment rights. The court of appeals' holding, however, also is flawed for an entirely independent reason: it cannot be squared with 5 U.S.C. 7117(a)(1), which provides that the duty to bargain exists only "to the extent not inconsistent with any Federal law or any Government-wide rule or regulation," and does not "extend to matters which are the subject of * * * a Government-wide rule or regulation." Although Circular A-76 ordinarily is not characterized as a rule or regulation (see pages 24-26, 37, *supra*), Congress plainly intended that policy directives would be treated as "rules or regulations" for purposes of Section 7117(a)(1),[23] as the FLRA itself has held. *AFGE, Local 225 and Dep't of the Army*, slip op. 4 (Circular A-76 is a government-wide rule or regula-

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[23] See H.R. Conf. Rep. 95-1717, *supra*, at 158-159; *Legislative History* at 997 (remarks of Rep. Ford). Indeed, OMB has accorded unions consultation rights when it has revised Circular A-76 subsequent to the enactment of Title VII, as is done in the case of "Government-wide rules or regulations" bearing on conditions of employment that are excluded from bargaining by Section 7117(a)(1). 5 U.S.C. 7117(d). See H.R. Conf. Rep. 95-1717, *supra*, at 155. We note that there is no anomaly in Congress's having treated Circular A-76 as if it were a "Government-wide rule or regulation" within the meaning of Section 7117, and not as a "law" or "law, rule, or regulation" within the meaning of other provisions of the Act (see pages 24-26, 37, *supra*): Section 7117 represents a legislative recognition that bargaining under the Act should not interfere with or lead to differential application of government-wide directives, regardless of their nature, while other provisions (such as Section 7103(a)(9)) set forth those areas that Congress believed *should* be subject to third party review. Congress therefore took special pains to explain that policy directives are excepted from negotiation by Section 7117.

tion under Section 7117(a)). See also *National Federation of Federal Employees and Dep't of the Air Force, Lowry Air Force Base*, 9 F.L.R.A. 151, 154 (1982) (Congress intended that the term "Government-wide rule or regulation" used in Section 7117 (a)(1) "not be confined only to those rules or regulations which meet formal requirements for notice or comment"). Negotiation about the Circular therefore is prohibited by Section 7117(a)(1).

1. As noted above (at 6), Circular A-76 establishes its own exclusive, expedited appeals procedure; in addition, it provides that agency contracting-out decisions are not subject to negotiation, arbitration or agreement. These provisions are critical to the contracting-out process established by the Circular. Yet the Union's bargaining proposal, which would bring comparatively elaborate grievance and arbitration procedures to bear on complaints concerning application of the Circular, would render these provisions pointless. The proposal also would exclude from the appeals process affected contractors and their employees, whose participation was deemed essential by the drafters of Circular A-76 for the fair and accurate resolution of contracting-out disputes. On its face, then, the Union proposal is "inconsistent with * * * [a] Government-wide rule or regulation" and may not be the subject of a duty to bargain under Section 7117(a)(1).

The court of appeals disregarded these inconsistencies between the Union proposal and the terms of Circular A-76, and accordingly held the proposal to be a mandatory subject of negotiation, on the ground that "the Circular's restrictive language cannot be construed to limit the statutory right to file grievances asserting a violation of contracting-out regula-

tions" (Pet. App. 16a).[24] But the very purpose of Section 7117(a)(1) is to provide that government-wide rules or regulations *do* limit the scope of rights under the Act. The provision unquestionably "authorizes * * * the issuance of government-wide rules or regulations which may restrict the scope of collective bargaining." H.R. Conf. Rep. 95-1717, *supra*, at 155. Section 7117(a)(1) thus expresses Congress's intent that agencies not be required to bargain about proposals that, if incorporated into the collective bargaining agreement, would be inconsistent with a government-wide directive like Circular A-76.

The other courts of appeals have used similar reasoning in holding that the grievance procedures authorized by Title VII must yield to the exclusive appeal mechanism prescribed by the National Guard Technicians Act of 1968.[25] *State of Nebraska, Mili-*

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[24] The court of appeals evidently meant by this to suggest that claimed violations of Circular A-76 automatically are made grievable by operation of the statutory grievance mechanism, whether or not such claims involve matters that are negotiable. This argument, however, is both incorrect and irrelevant to Section 7117(a)(1). Even if the court were right in its view that alleged violations of the Circular are *grievable* (but see pages 35-42, *supra*), proposals concerning compliance with the Circular still would be rendered *non-negotiable* by Section 7117(a)(1); because this case concerns only negotiability and not grievability, the court of appeals should have reversed the FLRA's negotiability determination and left resolution of the grievability issue for another day. Moreover, because the Circular's expeditious appeals procedure is necessary to make the contracting out process work (see pages 19-20, 35, *supra*), a proposal that would lead to modification of the Circular's appeals mechanism in effect is inconsistent with the Circular's substance.

[25] The National Guard Technicians Act of 1968, 32 U.S.C. 709(e)(5), provides that "[n]otwithstanding any other pro-

*tary Dep't* v. *FLRA*, 705 F.2d 945, 950 & n.8 (8th Cir. 1983); *California National Guard* v. *FLRA*, 697 F.2d 874, 879 (9th Cir. 1983); *New Jersey Air National Guard* v. *FLRA*, 677 F.2d 276, 283 (3d Cir.), cert. denied, 459 U.S. 988 (1982). See also *Indiana Air National Guard* v. *FLRA*, 712 F.2d 1187, 1191 (7th Cir. 1983). These courts have reasoned that union proposals calling for a negotiated grievance procedure in connection with adverse actions affecting National Guard technicians are not negotiable, "since the [Civil Service Reform] Act itself provides that an agency's duty to bargain in good faith exists 'to the extent not inconsistent with any Federal law.'" *California National Guard*, 697 F.2d at 879 (quoting 5 U.S.C. 7117(a)(1)). Because Section 7117(a)(1) treats Circular A-76 as though it were a government-wide rule or regulation that must receive dignity equal to federal law, this principle prohibits bargaining about proposals that are aimed at superseding the exclusive appeals provision in the Circular.

2. Section 7117(a)(1) also bars negotiation over the Union's proposal for a broader reason: the statute flatly declares that the duty to bargain does not extend to "matters which are the subject" of a "Government-wide rule or regulation." See *Legislative History* 927 (remarks of Rep. Udall) (Section 7117(a)(1) "makes Government-wide rules or regulations an absolute bar to negotiations"). Because the nature of the contracting-out process is the subject of a "Government-wide rule"—Circular A-76 (see note 23, *supra*)—it therefore cannot be the subject of bargaining.

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vision of law • • • a right of appeal which may exist with respect to [an adverse action] shall not extend beyond the adjutant general of the jurisdiction concerned."

Respondents have suggested (FLRA Br. in Opp. 17 n.18) that the Union proposal is harmless because it seeks only to incorporate the provisions of Circular A-76 into the contract. But this argument ignores the plain language of the statute: Congress in Section 7117(a)(1) declared that the "subject[s]" of government-wide rules may not be discussed at the bargaining table by individual agencies. It presumably did so in an attempt to forestall the danger that even seemingly innocuous contractual provisions might lead to disparate treatment of government-wide requirements by different agencies—or by different negotiated grievance mechanisms.[26] Congress thus "remove[d] many Government-wide regulations from collective bargaining." *Legislative History* at 933 (remarks of Rep. Clay). See *id.* at 956 (remarks of Rep. Ford). The Union's proposal cannot escape this limitation.

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[26] In fact, the Union's proposal is innocuous only if claimed violations of Circular A-76 already are subject to the statutory grievance mechanism, as respondents elsewhere assert. If that is true, however, a contractual provision requiring agency compliance with the Circular would be wholly superfluous; keeping the Union's proposal from the bargaining table under Section 7117(a)(1) therefore would in no way affect the interests of Union members. If alleged violations of the Circular are not otherwise grievable, however, permitting negotiation on the Union's proposal (and thus, ultimately, use of arbitral review) would affect contracting out decisions made by the EEOC but not by other agencies, thus distorting the implementation of the government-wide Circular A-76. Either way, there is no reason to strain to read Section 7117(a)(1) to permit bargaining on an issue that undeniably is the "subject" of a government-wide rule or regulation.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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## APPENDIX

5 U.S.C. 7103(a)(9) provides:

> "[G]rievance" means any complaint—
>
> (A) by any employee concerning any matter relating to the employment of the employee;
>
> (B) by any labor organization concerning any matter relating to the employment of any employee; or
>
> (C) by any employee labor organization, or agency concerning—
>
> > (i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or
> >
> > (ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment[.]

5 U.S.C. 7106 provides:

> Management rights
>
> (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—
>
> > (1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and
> >
> > (2) in accordance with applicable laws—
> >
> > > (A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from—

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

5 U.S.C. 7117(a)(1) provides:

> Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

5 U.S.C. 7121(a)-(e) provides in part:

> (a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.
>
> (2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.
>
> (b) Any negotiated grievance procedure referred to in subsection (a) of this section shall—
>
> (1) be fair and simple,
>
> (2) provide for expeditious processing, and
>
> (3) include procedures that—
>
> * * * * *
>
> (C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may

be invoked by either the exclusive representative or the agency.

(c) The preceding subsections of this section shall not apply with respect to any grievance concerning—

(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 of this title;

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

(d) An aggrieved employee affected by a prohibited personnel practice under section 2302 (b) (1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first. Selection of the negotiated procedure in no manner prejudices

the right of an aggrieved employee to request the Merit Systems Protection Board to review the final decision pursuant to section 7702 of this title in the case of any personnel action that could have been appealed to the Board, or, where applicable, to request the Equal Employment Opportunity Commission to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission.

(e)(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both.

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